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No. 413

IN THE

Supreme Court of the United States

October Term, 1940

CONTINENTAL OIL COMPANY, a Corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO FOUR SUBDIVISIONS OF NATIONAL LABOR RELATIONS BOARD BRIEF

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The Petition for Writ of Certiorari presents eight questions for the Court's consideration. Appended to the Petition is the Petitioner's supporting brief.

The Respondent, National Labor Relations Board, has filed a brief in opposition. Counsel for Respondent have combined into four subdivisions in their argument the eight questions presented.

We briefly reply, directing our reply to the four subdivisions of Respondent's brief.

Reply to Subdivision 1:

This relates to the reinstatement orders of Jones and Moore, with back pay. Counsel for Respondent admit that there is a conflict in the decisions of the various Circuit Courts on the question presented as to whether Moore and Jones, or either of them, under the circumstances disclosed

in the record, are employees entitled to reinstatement with back pay under the provisions of the National Labor Relations Act. This admission justifies certiorari.

Counsel contended, however, that the Petitioner did not raise this question before the Board and consequently is precluded from raising it before this Court. In making this statement we submit counsel are in error, as the Petitioner did raise this question consistently from the first time it appeared in the case; that is, before the Trial Examiner of the Board, before the Board itself, before the United States Circuit Court of Appeals for the Tenth Circuit, and now before this Court. We will first refer to the examination of Ernest Jones before the Trial Examiner by counsel for the Board (R. 958-962). Jones was interrogated concerning his earnings as proprietor of his mercantile store. Continental Oil Company, through its attorney, then objected (R. 959) as follows:

> "We will make a further objection, general objection, to all this line of testimony, that it is not contemplated by any law, and entirely improper to consider at all the earnings of a man who has gone in business in connection with any reinstatement claim.
>
> "Wages and such things as that may be considered, but not any gain or loss that comes from a business. When a man goes into business, he takes business chances."

This objection was overruled by the Trial Examiner (R. 959). Jones, upon further questioning (R. 960-961) then testified that all his income, after he left the employment of Continental Oil Company, came from the operation of this general store. The attorney for the Board then made the following statement into the record (R. 961-962):

> "Mr. Shaw: Mr. Examiner, the evidence shows that the earnings of the witness Jones, if any, have resulted from the operation by himself of a general store and postoffice in the town of Parkerton, Wyo.
>
> "The witness has testified that this is his sole source of earnings. There may be the added element of cost

accounting involved in trapping. At any rate, I think that this hearing is no place for us to go into involved matters connected with cost accounting showing profits and losses in the grocery and postoffice business. The matter would be lengthy, and, I think, improper.

"I am, therefore, not at this time introducing any evidence concerning the earnings of this witness from April 27, 1936, up to the present time; and I shall ask the Board to hold such matters relating to Jones' earnings until such time as it becomes necessary to make actual restitution in the form of back wages in case the National Labor Relations Board may enter an order reinstating this man to his former position in the respondent with back pay."

Neither the Trial Examiner in his Intermediate Report nor the Board in its Order and Decision made any specific finding as to whether Moore and Jones were employees within the meaning of the Act entitled to reinstatement and reimbursement. However, both the Trial Examiner in his recommendations and the Board in its Order and Decision ordered both reinstatement and reimbursement. Exceptions were taken to these provisions of the Intermediate Report and the Order and Decision of the Board, and in both oral argument and brief before the Board in support of these exceptions we urged the impropriety of the reinstatement and reimbursement provisions.

In Section 3 of the "Conclusions" of the Intermediate Report the Trial Examiner found Continental Oil Company guilty of not only unlawfully discharging Moore and Jones but also of unlawfully refusing to re-employ them (R. 150). In its "Exceptions to Intermediate Report" (Exceptions Nos. 97, 98, R. 170, 171) exception is specifically taken to this paragraph of the Intermediate Report.

Subdivisions b and c of Paragraph 3 of the Recommendations in the Intermediate Report are directed to the reinstatement of Moore and Jones and their reimbursement for loss of pay (R. 151).

Specific exceptions to these paragraphs of the Intermediate Report are found in Paragraphs 106 and 107 of the Exceptions to the Intermediate Report (R. 172).

As shown by the Decision, Order and Direction of Election entered by the Board in this matter on May 9, 1939, which was the subject matter of the case before the United States Circuit Court of Appeals, Continental Oil Company filed a brief with the Board and presented an oral argument before the Board in support of its exceptions to the Intermediate Report (R. 39, 40). The following excerpts are taken from the brief filed with the Board from the summary of the argument presented to the Board on the various questions involving Moore and Jones. Quoting from pages 144-146:

> "Third, even though Jones and Moore might otherwise be considered employees, they are excluded from that definition and from the power and jurisdiction of the Board to order their reinstatement because under Section 2, subdivision 3, of the Act an employee does not include one who has obtained any other regular and substantially equivalent employment. Moore was earning $112.50 per month in Big Muddy. He, of course, rented his own house and paid his own board bill. The evidence shows that as guard at the state penitentiary he is getting $70 a month, plus his room and board.
>
> "Jones, after his employment ceased, quit the role of an employee entirely. He purchased a general merchandise store; he had himself appointed postmaster. This started within two weeks after the attempted transfer. At all times since, he has operated the store as a merchant and has acted as postmaster. Surely the Act does not contemplate that Jones has remained an employee, irrespective of the cause of his quitting the company.
>
> "In *NLRB v. Sands Mfg. Co.*, supra (C.C.A. 6), May 13, 1938, 96 Fed. (2d) 721, 726; in *Standard Lime & Stone Co. v. NLRB*, (C.C.A. 4), June 13, 1938, 97 Fed. (2d) 531, 535, and in *Mooresville Cotton Mills v. NLRB*,

(C.C.A. 4), 94 Fed. (2d) 61, and 97 Fed. (2d) 959, (on rehearing), the Sixth and Fourth Circuit Courts of Appeal have directly held that former employees who have secured such equivalent employment elsewhere are not employees within the meaning of the Act and are not within the jurisdiction of the Board with reference to reinstatement. And, as held by the Ninth Circuit in *NLRB v. Carlisle Lumber Co.*, (Oct. 15, 1938) 99 Fed. (2d) 533, the employee must be an employee at the time of the Board's order to be considered an employee within the reinstatement and reimbursement provisions of the statute.

"As a matter of law, therefore, we submit neither Jones nor Moore is an employee of the company within the meaning of the Act, irrespective of the reason that they quit the employment of the company and consequently are not within the reinstatement or reimbursement jurisdiction of the Board.

* * * * * * * *

"9. With further reference to Jones and the reimbursement order recommended as to him, we call attention to the impossibility of working out any such order as well as to its impropriety. Here is a man who went into business. He did not go and seek employment elsewhere as an employee. He decided to run the financial risks incident to a proprietary business operation. How is it going to be determined what his gains or losses have been? Is the Continental to be charged with his possible poor business management which may have resulted in the loss? Is it to be charged with loss of income resulting from poor credit risks? Is it to be charged with inventory losses, depreciation, and all such items which enter into the 'Gain and Loss' column of a business enterprise? We point out these few matters as further indication that it cannot be possible that Jones can still be considered an employee of the Continental within the meaning of the Act. Moore, of course, is not an employee because, as shown by the record, he is now, and at all times since he ceased his employment

with the Continental has been, employed elsewhere at a regular and substantially equivalent employment."

In view of the above, we repeat that counsel for the Board are in error in stating on pages 7, et seq., of their brief filed herein that the question as to whether Jones and Moore were employees within the reinstatement and reimbursement provisions of the Act was not raised before the Board.

The Board admits that the question was raised in the Circuit Court and was considered and decided by that Court. Counsel for the Board rely upon a provision of Section 10 (e) of the Act which provides for reviews by the Circuit Courts of orders of the Board, which reads:

"No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Obviously this provision is directed to the Circuit Court of Appeals, and not to the Supreme Court. Admittedly, the Circuit Court did consider and decide the question. The Board made no contention in the Circuit Court that this question was not properly before the Circuit Court. Neither the answer of the Board to the Petition for Review nor the Board's brief filed with the Circuit Court raises any such question. We have a situation, therefore, where the question was not only raised before the Board but was actually considered and decided by the Circuit Court after full argument both by brief and orally before the Circuit Court.

It is submitted that the granting of the writ of certiorari on the reinstatement and reimbursement orders of Jones and Moore is fully justified for reasons set forth in the petition and supporting brief, which reasons are confirmed by opposing brief.

Clearly, as pointed out in our opening brief and admitted by the Board in its brief, the applicable decisions of

the various Circuit Courts on these questions are in conflict. Not only are the decisions of the Circuit Courts in conflict but also the order requiring reimbursement is necessarily punitive and not remedial and in conflict with the applicable decisions of this Court referred to in our opening brief. Particularly as to Jones, the order of reimbursement which will necessitate reimbursing him for his business losses, if it develops that he is a poor business man or has had an unfortunate business experience in the operation of his general store, an important question of federal law is involved which should be decided by this Court if the desions cited in our opening brief shall be thought not to directly control the question.

Reply to Subdivision 2:

This subdivision in the Board's brief relates to the portion of the reinstatement and reimbursement order of Moore and Jones which requires the company to pay over to governmental relief agencies sums equal to any amounts disbursed by those agencies for the employment of Jones and Moore on work relief projects. As appears from our opening brief and from the Board's brief, the decisions of the Circuit Courts on the propriety of this provision are directly in conflict. The question is now pending in this Court on certiorari in the Republic Steel Corporation case. These facts in themselves, we submit, should require the granting of certiorari in the present case. If the question is of sufficient importance to justify certiorari in the Republic Steel Corporation case so that the law may be definitely established by this Court, then that law which will be declared by this Court should be made applicable to the present case. The only answer the Board attempts to make in its brief to the application for writ of certiorari on this point is the contention that we did not raise this question in the Circuit Court. It is not contended that we did not raise it before the Board. We submit we did raise it before the Circuit Court and that the Circuit Court considered and decided it. The paragraph of the Board's order to which the objection is raised is paragraph (g), page 78 of the record. In Paragraph 64 of the Petition for Review filed by Continental Oil Company with

the Circuit Court for the Tenth Circuit (R. 17, 18), we directly attacked paragraph (g) of the Board's order. So this issue was affirmatively presented to the Circuit Court. It is true, as stated by counsel, that the point was not emphasized in the opening brief filed with the Circuit Court, but it was raised and presented at length in the petition for rehearing filed with the Circuit Court, which petition for rehearing was denied. Clearly, the Circuit Court had the issue presented to it and decided that issue in a manner which conflicts with decisions of other circuits, and decided an issue of law of which this court has assumed jurisdiction in the Republic Steel Corporation case.

Reply to Subdivision 3:

Subdivision 3 of the Board's brief relates to Questions 6 and 7 in the petition for writ of certiorari. Question 6 in the petition involves the propriety of an order requiring an employer of 80 employees to bargain exclusively with 4 of those employees as the bargaining agency of the 80 employees because of a designation of a particular union as a bargaining agency made more than five years prior hereto, and approximately four years before the Board's order. Question 7 involves the propriety of ordering the employer of 21 employees to recognize 4 employees as the exclusive bargaining agency for the 21 based upon a similar designation five years prior hereto and four years prior to the Board's order, and involves the further question as to the power of the Board to enter such order and entirely ignore a subsequently formed union having as its members 16 out of the 21 employees, against which union no charge of company domination, or otherwise, has been made. The Board in its brief admits a conflict in the applicable decisions of the various circuits on the propriety of these orders. Furthermore, as pointed out by the Board in its brief, (p. 15), this question is now pending in this Court on certiorari in *The International Association of Machinists* Case, No. 16, this Term.

Our position is that the Board has no power as to Glenrock Refinery to order the company to bargain exclusively with 4 employees as the bargaining agency of 80 employees;

also in the Big Muddy Field the Board has no power to order the company to deal exclusively with 4 employees as the bargaining agency of 21 employees, particularly when a new union has been formed with a membership of 16 out of the 21 employees, against which new union no charge has been made. If any power exists, it was abused in this case. The orders entered certainly cannot further the purposes of the Act. The question presented is of great public importance. It is involved in conflict in the decisions of the various circuits; it is pending on certiorari in this Court. The orders are clearly punitive and not remedial and violate the decisions of this Court that the Act is remedial and not punitive. Certiorari on these points, we submit, should be granted.

Reply to Subdivision 4:

Subdivision 4 of counsel's brief is the Board's answer to Question 8 in the petition for writ of certiorari. This Question 8 raises the question of the identity of the International Association of Oil Field, Gas Well and Refinery Workers of America, an American Federation of Labor union, and the Oil Workers International Union, a Committee for Industrial Organization union. As pointed out in our brief in support of the petition, all dealings which Continental Oil Company had with Local 242 were with that local as a local of the International Association of Oil Field, Gas Well and Refinery Workers of America, an A F of L union. That union filed no charges. The company is not ordered to recognize that union. It is ordered to recognize no local of any union but the Oil Workers International Union, a CIO union. The 1935 designations upon which the Board in 1940 finds exclusive representative rights in Oil Workers International Union named not the Oil Workers International Union as the bargaining agency, but Local 242 of the International Association of Oil Field, Gas Well and Refinery Workers of America, an A F of L union.

Our position is that these two unions are not the same. Their constitutions and principles are diametrically opposed. It is beyond the power of the Board to order an employer to deal exclusively with a union which was never designated

as the bargaining agency by the employees. The decision of the Circuit Court in this case finding the CIO union and A F of L union to be identical clearly involves a question of law, and one that is of great public importance. It concerns not only the employer and the employees involved in the present case, but also numerous similar situations of which this Court will take judicial notice based upon the universally known contest between the A F of L and the CIO. The public importance of the question itself is sufficient to justify certiorari.

Conclusion

We respectfully submit that certiorari should be granted on each and all of the eight questions presented in the petition.

Respectfully submitted,

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